IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

JAIME LYNN BUTLER, a minor, by and through her guardian, JAMESCITA PESHLAKAI; and others similarly situated,

Plaintiff/Appellant,

v.

JANICE BREWER, in her official capacity as Governor of the State of Arizona; ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; HENRY DARWIN, in his official capacity as director, Arizona Department of Environmental Quality,

Defendants/Appellees.

No. 1 CA-CV 12-0347

Maricopa County Superior Court No. CV2011-010106

APPELLANT'S OPENING BRIEF

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Statement of the Case.

Jaime Lynn Butler filed suit in Maricopa County Superior Court, seeking a declaratory judgment that Arizona Governor Janice Brewer, the Arizona Department of Environmental Quality ("ADEQ"), and Henry Darwin, the director of ADEQ ("the State") have violated their duties under the public trust doctrine to preserve the atmosphere as a trust asset. Index of Record ("IR") # 8. The State filed a motion to dismiss under ARIZ. R. CIV. P. 12(B)(6) for failure to state a claim upon which relief may be granted. IR # 5. The Superior Court held argument on the motion, and granted it. IR # 18; Transcript ("TR"), 2/10/12 at 16. Butler filed this appeal.

Jurisdiction.

The Superior Court entered judgment on March 27, 2012. IR # 20. Butler filed a timely notice of appeal on April 19, 2012. IR # 21. This Court has jurisdiction to consider this appeal pursuant to A.R.S. § 12-2101(A)(1).

Statement of Facts.

Jaime Lynn Butler was ten years old when this case was filed, and lives in Cameron, Arizona. IR # 8 at 2 ¶ 4. She is a member of the Navajo Tribe and born into the Bitter Water Clan, with maternal grandfathers of the Red House Clan and paternal grandfathers of the Towering House Clan. *Id*. She is a hoop dancer, and plays basketball. *Id*. She is also by her choice active in and committed to

conserving natural resources. IR # 8 at 3 ¶ 5. As part of her activism, she has participated in community activities to preserve water, and she frequently writes the President to request his assistance for things she deems important, such as the Arctic National Wildlife Refuge. *Id*.

Jaime and others like her in Arizona suffer from increased temperatures, in part because they diminish and may eliminate water she relies on, and diminish precipitation her family uses for its garden. *Id*. Jaime also enjoys wildlife native to Arizona, including eagles, and native wildlife is threatened by climate change. *Id*. Jaime has a horse, boarded by her grandfather, and increased temperatures have increased the cost for its feed. IR # 8 at 3 ¶ 4.

Carbon dioxide ("CO_2"), methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride are known as greenhouse gases. IR # 8 at 3 ¶ 9. These gases prevent heat from escaping from Earth to space, like the panels of a greenhouse. *Id*. Over the past 800,000 years, average concentrations of greenhouse gases remained within a range that facilitated relatively stable ecosystems on Earth. *Id*. Humans have altered this balance. IR # 8 at 3 ¶ 10. The burning of fossil fuels such as coal and oil, together with deforestation, have caused substantial increases in atmospheric concentrations of greenhouse gases. *Id*. The increases exceed their removal through natural processes.[1]

[1] Historic concentrations of CO_2 have ranged from 180 to 300 parts per million

In 2009, the United States Environmental Protection Agency ("EPA") found that "greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009); IR # 8 at 4 ¶ 13. The EPA found that "[t]he evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climate changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action." 74 Fed. Reg. 18,886, 18,904 (April 24, 2009); IR # 8 at 4 ¶ 13.

A primary effect of increases in greenhouse gases in the atmosphere is an increase in temperatures on the surface of Earth. IR # 8 at 4 ¶ 14. Over the last 100 years, average temperatures have increased by .67 to .8 degrees Celsius, or 1.2 to 1.4 degrees Fahrenheit. The American West has seen an increase on average of 1.4 degrees Fahrenheit temperatures over the last 100 years. *Id*. Eight of the 10

("ppm"), however in March, 2011, the monthly average concentration of CO_2 in the atmosphere, recorded at Mauna Loa, Hawaii, was 392.40 ppm. IR # 8 at 4 ¶ 11. Concentrations of other greenhouse gases in the atmosphere also show dramatic increases over historic levels. Since 1750, atmospheric concentrations of methane and nitrous oxide have increased by over 148 percent and 18 percent, respectively. *Id*. Humans continue to emit greenhouse gases into the atmosphere at a rate that outpaces their removal through natural processes. IR # 8 at 4 ¶ 12. The projected rate of increase of CO2 in the atmosphere is about one hundred times faster than occurred over the past 800,000 years. *Id*. Additionally, greenhouse gases in the atmosphere last a very long time. A substantial portion of every ton of emitted CO2 persists in the atmosphere for as long as a millennium. *Id*. As a result, current concentrations of greenhouse gases in the atmosphere are the cumulative result of historic and current emissions. *Id*.

hottest years since instrumental records have been kept have occurred since 2001. *Id*. The year 2010 ties for the hottest year ever recorded; Earth is now within 1 degree Celsius, or 1.8 degrees Fahrenheit, of its highest average temperatures in one million years. *Id*.[2]

Increasing temperatures have caused significant impacts in the United States. Certain regions have experienced increased frequency and amount of rain, in part because as sub-freezing temperatures become more rare, clouds can hold more moisture, and precipitation increases. IR # 8 at 5 ¶ 16. In other regions, glaciers are retreating and melting, permafrost is retreating and thawing earlier, and ice-free seasons are lengthening in rivers and lakes. *Id*.

Increasing temperatures are causing significant impacts in Arizona. Precipitation in Arizona is influenced by elevation and season of the year. IR # 8 at 5 ¶ 17. Historically, from November through March, storm systems from the Pacific Ocean cross Arizona and would occur frequently in the higher mountains of the central and northern parts of the state, sometimes bringing heavy snows, and leading to accumulation of 100 inches or more. *Id*. The gradual melting of this snow during the spring supplied water to rivers. *Id*. But as temperatures have increased, less winter snow has led to less melting snow in the spring, and lower river levels across the state.

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[2] Not only have temperatures increased across the globe, but the rate of increase of average temperatures has accelerated in the past 30 years. IR # 8 at 4 ¶ 14.

In April 2011, the United States Department of the Interior ("Interior") projected that given current temperature trends at current rates, western states including Arizona will experience an average temperature increase of 5-7 degrees Fahrenheit. IR # 8 at 5 ¶ 18. Interior projected that precipitation would further decrease in the Southwest and that almost all of the "April 1st snowpack," which is a benchmark to measure and predict river basin runoff, would decrease. *Id*. Interior projected an 8 to 20 percent decrease in average annual stream flow in the Colorado River basin, which supplies much of Arizona's water for communities and agriculture. *Id*. Interior noted that projected changes in temperature and precipitation are likely to impact the timing and quantity of stream flows in the Colorado River, impacting water available to farms and communities, hydropower, fish and wildlife, and recreation. *Id*. Predictions specific to Arizona include a 40% reduction in river basin water storage, and a decline of 45% to 56% in regional hydroelectric power production. *Id*. In 2006, Arizona's spring runoff season, which measures snowmelt from January through May, provided 121,000 acre feet of water, as compared to a normal average of 665,000 acre feet of water. *Id*.

Further, forests in Arizona are "very sensitive" to changes in temperature. IR # 8 at 6 ¶ 19. In 2010, scientists found that current temperatures and projected increases will result in more frequent forest fires, higher tree death rates, more insect infestations, and weaker trees in the Southwest. *Id*. In 2006, the fire season

in Arizona's forests began in the month of February, earlier than ever before. *Id*. Two of the worst wildfires in Arizona history occurred in 2002 and 2005, affecting nearly 750,000 acres. *Id*. In 2011, the Wallow fire burned approximately 469,000 acres in eastern Arizona, the largest in the state's history. *Id*.

Currently, CO_2 levels in the atmosphere exceed 390 ppm. IR # 8 at 8 ¶ 27. This is too high to maintain the climate in which humanity, wildlife, and the biosphere adapted over a significant time period. *Id*.[3] Humans are nearing what scientists characterize as a "tipping point" in the context of climate change, meaning that changes in climate conditions reach a point where, even without additional releases of CO_2 into the atmosphere, further rapid and uncontrolled changes nonetheless occur. IR # 8 at 8 ¶ 26.

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[3] Dr. James Hansen of the NASA Goddard Institute for Space Studies and Columbia University Earth Institute, and other atmospheric scientists, have found that atmospheric CO_2 levels must be reduced to a maximum of 350 ppm to preserve Earth in those physical respects similar to that which life on Earth adapted. IR # 8 at 8 ¶ 28. To preserve Earth's natural systems, average global peak surface temperature must not exceed 1 degree Celsius, or 1.8 degrees Fahrenheit, above pre-industrial temperatures in this century. *Id*. To prevent global heating greater than 1 degree Celsius, or 1.8 degrees Fahrenheit, and to protect Earth's oceans, concentrations of atmospheric CO_2 must decline to less than 350 ppm by the end of this century. *Id*. To have the best chance of reducing the concentration of CO_2 in the atmosphere to 350 ppm by the end of the century and avoid heating over 1 degree Celsius, or 1.8 degrees Fahrenheit, over pre-industrial temperatures, the best available science concludes that CO_2 emissions need to peak in 2012 and then begin to decline at a global average of 6% per year through 2050 and 5% per year through 2100. *Id*. In addition, carbon sequestering forests and soils must be preserved and replanted to sequester an additional 100 gigatons of carbon through the end of the century. *Id*. at 9 ¶ 28.

In February 2002, Arizona Governor Janet Napolitano issued executive order ("EO") 2005-02, which provides that Arizona has "particular concerns about the impacts of climate change and climate variability on our environment, including the potential for prolonged drought, severe forest fires, warmer temperatures, increased snowmelt, reduced snow pack, and other effects . . . ." IR # 8 at 6 ¶ 20. EO 2005-02 established a Climate Change Advisory Group to be coordinated by ADEQ and charged with doing two things: produce an inventory of greenhouse gas emissions in Arizona and their sources by June 2005, and prepare a plan with recommendations for reducing these emissions. *Id*. The group included members from industry, government, and public interest organizations. *Id*.

In August 2006, the Director of ADEQ issued a Climate Change Action Plan. IR # 8 at 6 ¶ 21. The plan states that between 1990 and 2005, Arizona's net greenhouse gas emissions increased by nearly 56%. *Id*. Taking into account certain state energy efficiency actions, the plan projects that Arizona's greenhouse gas emissions will increase by 148% from 1990 to 2020. *Id*. That rate of increase is the highest projected rate of increase among all 50 states, and almost five times higher than other states in the West with climate action plans. *Id*.

The plan acknowledges that "[b]ecause of the build-up in the atmosphere of [greenhouse gas emissions] and the length of time (100 years or longer) that [emissions] like CO_2 will remain in the atmosphere, Arizona will experience the

effects of climate change for years to come, even if immediate action is taken to reduce future [] emissions." IR # 8 at 7 ¶ 22. The plan recommends that Arizona reduce greenhouse gas emissions to 2000 levels by 2020, and 50% below 2000 levels by 2040. *Id*. To meet these goals, the plan recommends 45 actions agreed to unanimously by the group, two that received supermajority support, and two that received majority support. *Id*. The plan states that these actions could reduce Arizona's greenhouse gas emissions to more than five percent below levels in the year 2000. *Id*. The plan states that they would result in significant economic benefits for Arizona, including cost savings, creating new jobs, and enhancing economic development. *Id*.

The transportation sector accounts for roughly 40% of Arizona's greenhouse gas emissions, with CO_2 accounting for 97% of transportation emissions. IR # 8 at 7 ¶ 23. A principal method to reduce greenhouse gas emissions from transportation is to improve vehicle fuel efficiency. *Id*. The plan recommended a "State Clean Car Program" to reduce greenhouse gas emissions from new light-duty vehicles. *Id*. In 2008, ADEQ promulgated regulations requiring new emission standards for vehicles sold in Arizona. *Id*.; ARIZ. ADMIN. CODE §§ R18-2-1801 – Appendix 13 (Clean Car Standards).

In February 2010, Arizona Governor Janice Brewer issued EO 2010-06. IR # 8 at 7 ¶ 24. Among other things, EO 2010-06 orders the creation of a Climate

Change Oversight Group, and orders it to recommend final action to be taken on whether the new Clean Car Standards shall become effective. *Id*. In January 2011, Governor Brewer directed ADEQ Director Darwin to initiate rulemaking to repeal the standards. IR # 8 at 7 ¶ 25. On April 29, 2011, ADEQ issued to the Arizona Secretary of State a notice of proposed rulemaking to repeal the standards. *Id*. The Governor's Regulatory Review Council repealed the standards on January 10, 2012. TR, 2/10/12 at 14. The repeal of the standards will exacerbate Arizona's contributions to increased temperatures and climate change. IR # 8 at 8 ¶ 25.

Statement of Issue Presented for Review.

Whether the public trust doctrine in Arizona includes the atmosphere.

Argument.

A. Standard of Review.

The appellate court reviews issues of law de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). The court must accept as true the facts alleged in the complaint and affirm dismissal of the case only if the plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998). All reasonable inferences must be resolved in the plaintiff's favor. *McDonald v. City of Prescott*, 197 Ariz. 566, 567, ¶ 5, 5 P.3d 900, 901 (App. 2000).

B. The Nature of the Public Trust Doctrine in Arizona.

The public trust doctrine emanates from Roman law: "By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea." Institutes of Justinian, 2.1.1 (J. Moyle trans. 3d ed. 1896) (cited in *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 33 Cal.3d 319, 434, 658 P.2d 709, 718 (1983)). The tenets of the public trust doctrine were adopted in English common law: "There are some few things . . . which . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water." 2 William Blackstone, Commentaries on the Laws of England 14 (1766) (cited in *Greer v. State of Connecticut*, 161 U.S. 519, 668 (1896)). In turn, the public trust doctrine was incorporated into colonial charters when the American colonies were established. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). The United States Supreme Court has recognized the public trust doctrine as an inherent component of state sovereignty. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). In the context of the State of Illinois selling submerged lands in the Chicago harbor to a private railroad, the United States Supreme Court held that "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the

preservation of peace. *Id*. at 453; *PPL Montana, LLC. v. Montana*, 565 U.S. ___, 132 S.Ct. 1215, 1234-35 (2012) (affirming state authority under the public trust doctrine).

Arizona courts have recognized that, as "an attribute of federalism, each state must develop its own jurisprudence for the administration of lands it holds in public trust." *Arizona Ctr. For Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 365, 837 P.2d 158, 167 (App. 1991). As early as 1931, the Arizona Supreme Court recognized the public trust doctrine. *Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 73, 4 P.2d 369, 372 (1931). The public trust doctrine in Arizona is grounded in two independent concepts: (1) Arizona courts' "constitutional commitment to the checks and balances of a government of divided powers," and (2) federal and state cases describing the common law of public trust. *Hassell*, 172 Ariz. at 366, 837 P.2d at 168. The first concept recognizes the role of the judiciary in the constitutionally-created system of checks and balances in Arizona to exercise judicial review of the actions of other government departments. *Id.; see* ARIZ. CONST. art. II § 17, art. III, art. VI § 1; John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 74-77 (1988). It is this "check and balance of judicial review [that] provides a level of protection against improvident dissipation of an irreplaceable res." *Hassell*, 172 Ariz. at 367, 837 P.2d at 169. The second concept enables Arizona courts to look

at public trust jurisprudence from other jurisdictions relating to the same or similar trust resources to guide their own understanding and interpretation of the public trust doctrine in Arizona. *Id.,* 172 Ariz. at 365 n.13, 837 P.2d 167 n.13 (citing cases from 38 states and the United States Supreme Court in analyzing a public trust claim); *see Cooley v. Ariz. Pub. Serv. Co.*, 173 Ariz. 2, 3, 839 P.2d 422, 423 (1991) (stating: "Since we find no Arizona cases which are factually similar to this one, we look to decisions from other states.").

In *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999), the Arizona Supreme Court recognized that "the public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people." *Id*., 193 Ariz. at 199, 972 P.2d at 215. There, the Arizona Supreme Court ruled that the Legislature could not by statute abrogate the power of the courts to consider the public trust in the context of claims to water in state water right adjudications:

> The Legislature cannot order the courts to make the [public trust] doctrine inapplicable to these or any proceedings. While the issue has been raised before the [special] master [appointed to first consider claims to water], we do not know if the doctrine applies to all, some, or none of the claims. That determination depends on the facts before a judge, not a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.

Id.

The holding in *San Carlos* is consistent with other court decisions describing the parameters of the public trust doctrine. The doctrine functions to establish permissible government action that affect trust assets. *Hassell*, 172 Ariz. at 366, 837 P.2d at 168 (citing *Kootenai Envtl. Alliance v Panhandle Yacht Club*, 105 Id. 622, 632, 671 P.2d 1085, 1095 (1983)). Within those parameters, a legislature can instruct a state to act in a certain way, however, courts retain authority to determine if they preserve public trust assets. As the court stated in *Hassell*, "[j]udicial review of public trust dispensations complements the concept of a public trust. . . . Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res . . . so the legislative and executive branches are judicially accountable for their dispositions of the public trust." *Id*.

C. The Atmosphere is a Public Trust Asset.

It is important to note that courts have established that "[t]he public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances." *In re Water Use Permit Applications*, 94 Haw. 97, 135, 9 P.3d 409, 447 (2000). "While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited." *Ctr. For Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1360, 83 Cal.Rptr.3d 588, 595 (Cal. App. 1 Dist. 2008). Instead, the "public trust doctrine, like all common law principles, should not be

considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309-10, 294 A.2d 47, 55-56 (N.J. Sup. Ct. 1972). In *Illinois Central*, the United States Supreme Court made it clear that the public trust doctrine applies not just to lands under navigable waters, but to other "property of a special character" as well, including public resources in "which the whole people are interested." *Id.*, 146 U.S. at 453-54.

Indeed, the air, synonymous with our atmosphere, has always been considered a public resource in which the whole people are interested. 2 William Blackstone, Commentaries on the Laws of England 4 (1766) ("There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . ."); *Matthews v. Bay Head Imp. Ass'n*, 95 NJ 306, 317-18, 471 A.2d 355, 361 (1986) (common property includes the air); *Nat'l Audubon Soc'y*, 33 Cal.3d at 435, 658 P.2d at 719 (recognizing tidelands of Mono Lake, as a trust asset, "favorably affect the scenery and climate of the area."). Inclusion of the air within the public trust doctrine can be found in the doctrine's ancient roots. *See* Institutes of Justinian, 2.1.1 (J. Moyle trans. 3d ed. 1896) ("The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore."). No convincing argument exists that the atmosphere is not a public trust

asset. Moreover, protecting the atmosphere as a public trust asset is of the upmost importance, because harm to the atmosphere also harms the public's ability to use traditional trust assets for drinking, fish and wildlife, ecological values, commerce, navigation, fishing and recreation.

Accordingly, since state courts first affirmed the public trust doctrine, many have also expanded its application to assets that were not historically recognized as public trust assets. *See, e.g., Baxley v. Alaska,* 958 P.2d 422, 434 (1998) (minerals); *In re Water Use Permit Applications,* 94 Haw. at 133-35, 9 P.3d at 445-47 (groundwater); *Just v. Marinette County*, 56 Wisc.2d 7, 201 N.W.2d 761 (1972) (shorelands above waterline); *Marks v, Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971) (tidelands); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 750 N.E.2d 1050, 1050 (2001) (parklands); *Nat'l Audubon Soc'y*, 33 Cal.3d at 358, 658 P.2d at 721 (nonnavigable waterways); *Ctr. For Biological Diversity*, 166 Cal.App.4th at 1359-64, 83 Cal.Rptr.3d at 595-99 (wildlife). Among the considerations these courts have used to determine that public resources are public trust assets are whether they are "natural resources of inestimable value to the community as a whole" or are "transient" in nature, *id.*, or whether they are of "vital importance . . . to the public welfare." *In re Water Use Permit Applications,* 94 Haw. at 133, 9 P.3d at 447.

Under these legal principles and given the undisputed facts of this case, the atmosphere is a public trust asset as an essential natural resource common to all in Arizona. Indeed, it is a resource so vital that if irreparably impaired, human and natural communities in Arizona as we know and enjoy them would cease to exist.

The EPA has found that "greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." Between 1990 and 2005, Arizona's net greenhouse gas emissions increased by nearly 56% and, even taking into account certain state energy efficiency actions, greenhouse gas emissions in Arizona will increase by 148% from 1990 to 2020, which is the highest projected rate of increase among the 50 states. The EPA has also found that "climate changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action." The effects of increasing temperatures in Arizona are severe and palpable. Arizona has suffered and is projected to continue to suffer from some of the highest temperatures, worst fires, and most significant droughts in its recorded history. Further, the Climate Change Advisory Group comprehensively considered and recommended specific actions to curb Arizona's dramatically increasing greenhouse gas emissions, and ADEQ responded by promulgating the Clean Car Standards, they nonetheless have since been rescinded.

D. No Ground for Dismissal Has Merit.

Despite this record, in the Superior Court, the State asserted several reasons why Butler's case should be dismissed. She addresses each in turn.

1. The Legislature Cannot Displace the Public Trust Doctrine.

A legislature cannot by statutory enactment displace the public trust doctrine. Moreover, by it terms, the Arizona Comprehensive Air Quality Act, A.R.S. §§ 49-401 – 503 ("CAQA"), does not displace, but instead complements, the public trust doctrine.

The sovereign's duties under the public trust require that it protect trust assets on behalf of public beneficiaries, present and future. They do not dictate a specific process or action. It is an attribute of sovereignty itself and, like the United States and Arizona Constitutions, it overlays other acts of government, including legislation and regulations. Justice Marshall described this construct in *Marbury v. Madison*, where he compared the United States Constitution to congressional acts. *Id*., 5 U.S. 137, 138 (1803) (stating: "An act of congress repugnant to the constitution cannot become a law."). For the same reason that an act of Congress cannot displace the United States Constitution, an act of the Legislature cannot displace Arizona's public trust doctrine.

The Arizona Supreme Court has addressed whether the legislature can displace Arizona's public trust doctrine. In *San Carlos*, the court explained that "the public trust doctrine is a constitutional limitation on legislative power to give

away resources held by the state in trust for its people" and that "[t]he Legislature cannot by legislation destroy the constitutional limits on its authority." *San Carlos*, 193 Ariz. at 199, 972 P.2d at 215.

The United States Supreme Court further explained this point in *Illinois Central*. There, Congress, the State, and the City of Chicago transferred title to lands in the city harbor to a railroad company to improve commerce. *Id.*,146 U.S. at 439-440. Reviewing the transfer under the sovereign's public trust duties, the Court explained that even though legislative acts allowed the transfer of public property, the public trust doctrine limited the ability of the sovereign to transfer certain lands because they were a public trust resource it must protect. *Id*. at 452-464. The sovereign was not permitted to abrogate its public trust duties and transfer public resources to private parties. *Id.* at 453-454.

The fact that CAQA addresses air pollution does not displace the public trust doctrine in Arizona. As in *Illinois Central* and *San Carlos*, courts retain authority to review legislation to ensure that it does not abridge the public trust doctrine. While CAQA could be a part of how the State fulfills its public trust obligations, its existence does not mean that it is fulfilling all of its public trust obligations. Indeed, the facts alleged prove otherwise.

2. <u>The Legislature Cannot Deprive Courts of Authority to Enforce the Public Trust</u>.

In 2010, the Legislature adopted A.R.S. § 49-191, which provides:

> Notwithstanding any other law, a state agency established under this title or title 41 shall not adopt or enforce a state or regional program to regulate the emission of greenhouse gas for the purposes of addressing changes in atmospheric temperature without express legislative authorization.

It is settled that the legislature cannot divorce Arizona courts of their authority to consider the public trust when adjudicating matters that relate to trust assets. *See San Carlos*, 193 Ariz. at 199, 972 P.2d at 215. A.R.S. § 49-191 attempts to effect that result, by directing that no agency can adopt or enforce a state or regional program to regulate greenhouse gas emissions to address atmospheric temperatures. But this Court need not reach the larger issue presented in *San Carlos*, because even if A.R.S. § 49-191 precludes ADEQ from "adopt[ing] or enforce[ing] a state or regional program to regulate the emissions of greenhouse gas[es]" in light of the State's public trust duties, dismissing this case on this basis is inappropriate. First, A.R.S. § 49-191 applies only to "state or regional program[s]" to regulate greenhouse gases. Fulfilling the public trust duties of the State does not create or enforce any specific state or regional programs, but instead sets parameters for acceptable actions of the State regarding greenhouse gas emissions. Exactly how the State fulfills its duties is up to it, subject to judicial review. Second, A.R.S. § 49-191 applies only to "state agenc[ies] established under [title 49] or title 41." Governor Brewer is a party in this case but not an agency established under either title, but instead holds an office created by the

Arizona Constitution. ARIZ. CONST. art. V § 1. Because she is not an agency, she is not bound by A.R.S. § 49-191. Third, A.R.S. § 49-191 applies only to the regulation of greenhouse gas emissions "for the purposes of addressing changes in atmospheric temperature." Although Butler alleges harm from greenhouse gas emissions, and that they significantly increase temperatures, high temperatures are not the only reason why ADEQ might regulate greenhouse gas emissions. The emissions are known to cause adverse public health effects, domestic security risks, impacts on private property rights, and, as Butler alleges, economic impacts. If ADEQ were to regulate greenhouse gas emissions for one or more of these reasons, A.R.S. § 49-191 would not apply. Therefore, even if A.R.S. § 49-191 somehow binds ADEQ, it is inappropriate to dismiss this case on this ground.

3. Butler Does Not Raise Non-Justiciable Political Questions.

An action for a judgment based upon the public trust doctrine does not implicate the political question doctrine. Arizona courts have jurisdiction to hear public trust cases, as it is a judicially-created and enforced doctrine. *Hassell*, 172 Ariz. at 365-370, 837 P.2d at 167-172. Butler, among the beneficiaries of the public trust, has a right to bring this action against the State for failing to fulfill its duties. *Ctr. for Biological Diversity*, 166 Cal.App.4th at 1366, 83 Cal.Rptr.3d at 601 (stating that cases "have been brought by private parties to prevent agencies of

government from abandoning or neglecting the rights of the public with respect to resources subject to the public trust" (citing *Illinois Central*, 146 U.S. at 387)).

The public trust doctrine is part of sovereignty and, like a constitution, it overlays other acts of government, including legislation or regulations. *See Illinois Central*, 146 U.S. at 439-440 ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust." *Hassell*, 172 Ariz. at 367, 837 P.2d at 169. The California Supreme Court affirmed this principle, holding that courts have concurrent jurisdiction with other branches related to the public trust. *Nat'l Audubon Soc'y*, 33 Cal.3d at 450-52, 658 P.2d at 731-32. Arizona courts have concurrent jurisdiction with other branches over the public trust.

Arizona courts have long recognized the importance of the separation of powers articulated in Article III of the Arizona Constitution, but it also articulates the basis for a strong judiciary capable of reviewing the actions of the other branches of government. *See* ARIZ. CONST. art. II § 17, art. III, art. VI § 1; Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. at 74-77. It is this "check and balance of judicial review [that] provides a level of protection against improvident dissipation of an irreplaceable [public trust resource]." *Hassell*, 172 Ariz. at 367, 837 P.2d at 169.

Arizona courts look to *Baker v. Carr*, 369 U.S. 186 (1962), to analyze whether a certain case raises a non-justiciable political question. *Kromko v. Arizona Bd. Of Regents*, 216 Ariz. 190, 192 ¶ 11, 165 P.3d 168, 170 (2007). The United States Supreme Court has stated the *Baker* formulations "are probably listed in descending order of both importance and certainty." *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004). Ultimately, *Baker* set a high bar for nonjusticiability: "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.*, 369 U.S. at 217. Courts caution that the doctrine is one of "political questions, not one of 'political cases.'" *Id.* The political question doctrine should not be applied to bar judicial review of a case simply because it involves a contentious issue.

Further, there are "judicially discoverable and manageable standards" for resolving the issues in this case. In the Superior Court, resolving the pleadings would not require an impermissible "initial policy determination," nor would the Superior Court express a lack of respect due coordinate branches of government. In granting the relief requested, the Superior Court would not impose policy decisions on agencies, or otherwise direct how an agency exercises its discretion.

Instead, the Superior Court would enforce the duties of the State, as trustee of the public trust res in protecting the atmosphere.[4]

To enforce these obligations, the Superior Court could review cases analyzing public trust duties and creating appropriate remedies; by considering evidence presented, including expert testimony, by all parties; by using its judgment regarding the State's fiduciary duties to the public trust; and by fashioning an order that does not compel the State to adopt a particular plan, but merely comply with its public trust obligations. At the foundation of the doctrine is the ancient common law principle that public trust resources are protected for the good of the citizens, including present and future generations of citizen beneficiaries. That "policy" provides the framework for the relief requested, and this foundational framework does not infringe or invade on the State's ability to espouse policy regarding public trust resources consistent with the overarching purposes of the public trust doctrine.

Arizona courts need not need to wait for another branch of government to define the extent of the public trust doctrine in Arizona, as Arizona courts have always made such determinations. *See San Carlos*, 193 Ariz. at 199, 972 P.2d at 215; *Hassell*, 172 Ariz. at 365-370, 837 P.2d at 167-172. Judicially-discoverable

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[4] *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006) and *Lawrence v. Clark County.*, 254 P.3d 606 (Nev. 2011), include lengthy discussions on how a court can evaluate governmental actions for violations of the public trust.

and manageable standards already exist for this court to properly and efficiently resolve Butler's claims. *See, e.g., Caminiti v. Boyle*, 107 Wash.2d 662, 674, 732 P.2d 989, 996 (1987) (stating that the court determines whether a state's disposition of a public trust asset "substantially impairs" the public interest in the asset) (citing *Illinois Central*, 146 U.S. at 453, 13 S.Ct. at 118).

Here, the Superior Court would apply the public trust doctrine to the atmosphere, and while no Arizona court has had the opportunity to do so, there is no reason why the Superior Court cannot. Additionally, a ruling on Butler's claims will not be legislative in nature, because, as discussed above, the State will be able to make the policy choices necessary to comply with the court's ruling. The Superior Court would not tell the State how to reduce greenhouse gas emissions, but what parameters the public trust doctrine places on its actions and what it must to do fulfill its trust duties. Butler has never asked the Superior Court to make the policy decisions, such as how to reduce greenhouse gas emissions, necessary to fulfill the State's public trust duties. She has only asked the Superior Court to apply the public trust doctrine to the atmosphere, determine if the State is fulfilling its duties under the doctrine, and if it is not fulfilling its duties, what requirements the State must meet in order to be in compliance with the doctrine as it relates to the atmosphere. The necessary policy decisions that would guide the state in meeting those requirements would be made by the State. Such an order from the

Superior Court would not be based upon statutory or regulatory structure, but on the State's overall duty to protect and manage the atmosphere. Last, the Superior Court is well-equipped to consider an issue such as climate change. As the United States Supreme Court noted in *Baker*, the political question doctrine serves to bar cases presenting political questions, not political cases. *Id.*, 369 U.S. at 217.

In sum, the issue of protecting the atmosphere is not committed to the political branches, and there are sufficient judicial standards for determining this action. It is clear that the political question doctrine does not apply. "If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." *Nat'l Audubon Soc'y*, 33 Cal.3d at 444 n.14, 658 P.2d at 717 n.14. "Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." *Kootenai Envtl. Alliance*, 105 Id. at 629, 671 P.2d at 1092.

4. Butler has Standing.

Butler has standing to bring this suit. Although the Arizona Constitution does not mandate standing, Butler meets the standing requirements often required to bring a civil action in Arizona. Further, even if Butler does not have standing, the court can still hear Butler's claims, given the importance of issues she raises.

a. Butler Has Alleged Distinct and Palpable Injuries.

The Arizona Constitution does not require a plaintiff to establish standing to maintain a civil suit. *Bennett v. Napolitano*, 206 Ariz. 520, 527 ¶ 31, 81 P.3d 311, 318 (2003) (internal citation omitted). Nonetheless, Arizona courts often require a plaintiff to establish standing. *Id.*, 206 Ariz. at 524 ¶ 16, 81 P.3d at 315; *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24, 961 P.2d 1013, 1019 (1998). To do so, "a plaintiff must allege a distinct and palpable injury." *Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). A plaintiff must also show that the alleged harm constitutes "a particularized injury to themselves." *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 17, 119 P.3d 460, 463 (2005). Other states have held that any member of the public has standing to raise a claim of harm to the public trust. *Ctr. For Biological Diversity*, 166 Cal.App.4th at 1364, 83 Cal.Rptr.3d at 600 (citation omitted).

Although Butler alleges general harm in Arizona from greenhouse gas emissions (IR # 8 at 3-9 ¶¶ 9-28), she also alleges distinct injuries to herself that establish standing. *Id*. at 2-3 ¶¶ 4-5. She alleges that, as a result of the State's actions, she has suffered and will suffer from: (1) increased temperatures that have diminished and may in the future eliminate water that she relies on to live; (2) diminished precipitation that her family uses for its garden; (3) negative impacts to native Arizona wildlife around her home; and (4) increased cost of feed for her

livestock. *Id*. These individual allegations establishes her standing, and in the aggregate they do so too.

Moreover, even if Butler's allegations cannot be construed as "distinct and palpable" injuries, that still does not defeat her standing. Arizona courts look to federal standing jurisprudence to inform Arizona's judicially-created standing requirements. *Sears*, 192 Ariz. at 69 ¶ 16, 961 P.2d at 1017 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The United States Supreme Court has established that when examining standing in the federal context, generalized harm does not preclude standing. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) (the fact that a harm is "concrete, though widely[-]shared" does not defeat standing). Additionally, the United States Supreme Court has twice found standing to exist in cases related to greenhouse gas emissions and climate change. In *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011), the Court found that the plaintiffs had standing, despite the fact that the alleged injury was widespread and could be suffered by virtually everyone. *Id*. at 2535. Similarly, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court recognized that the mere fact that "these climate change risks are 'widely shared'" does not mean that they cannot suffice for purposes of standing. *Id*. at 522. The Court's rulings on standing in the context of climate change and greenhouse gas emissions, in combination with case law, make it clear that Butler has standing.

b. The Court May Hear Butler's Claims Based on their Importance.

The Arizona Supreme Court has held that it has jurisdiction to resolve cases where a party lacks particularized injury where the case presents "issues of great public importance that are likely to recur." *Bennett*, 206 Ariz. at 527 ¶ 31, 81 P.3d at 318 (internal citation omitted). Here, the State's public trust duties are greatly important. All Arizonans have a direct and personal interest in the State fulfilling its duties and not wasting resources the State must protect. The State's willingness to allow perilously high levels of greenhouse gas emissions has had, and will continue to have, negative effects on Arizonans. It is important for all Arizonans that this Court hear Butler's claims and determine whether, and the extent to which, the State has violated its public trust duties. Because this issue is of great public importance, is continuing to recur, and will likely recur in the future, the Court can hear the present action, even if traditional standing is found to be lacking.

5. Butler Has Standing Under the UDJA.

Under the Arizona Uniform Declaratory Judgments Act, A.R.S. §§ 12-1831 – 12-1846 ("UDJA"), Butler may seek a remedy under the public trust doctrine. Under the UDJA, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." A.R.S. § 12-1831. The UDJA "is remedial; its

purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." ARS § 12-1842. Further, "[d]eclaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials." *Rivera v. City of Douglas*, 132 Ariz. 117, 119, 644 P.2d 271, 273 (App. 1982). Arizona courts may hear cases under the UDJA except in "cases where a declaration of rights would be unnecessary or improper at the time under all the circumstances." *Pena v. Fullinwider*, 124 Ariz. 42, 45, 601 P.2d 1326, 1329 (1979). For a justiciable controversy to exist under the UDJA, there must "be an actual controversy ripe for adjudication and that there be parties with a real interest in the questions to be resolved." *Id*.

Here, Butler has alleged sufficient facts to establish an actual, justiciable controversy between herself and the State, and only through a declaration of her rights and the duties of the State under the public trust doctrine can her harm be redressed. Further, as established above, Butler has identified a legal right. The public trust doctrine is alive and well in Arizona, and it applies to the State. Butler asked the Superior Court to delineate the responsibilities of the State in light of the public trust doctrine as it relates to the atmosphere. This asked the Superior Court to interpret a recognized body of law and apply it to a factual situation that previously has not been before an Arizona court.

Butler has shown that the State has the power to deny her asserted interests or to redress her grievances. Butler alleges that Governor Brewer, ADEQ, and ADEQ Director Henry Darwin have the power to deny Butler's asserted interests and that they can redress her harms by complying with an order granting her requested relief from this court. IR # 8 at 3 ¶¶ 6-8.

Finally, this case would serve an essential purpose of the UDJA. Its purpose is to "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." A.R.S. § 12-1842. Here, Butler's action meets the purpose of the UDJA. She has sufficiently alleged that she has been and will continue to be harmed by the State's actions, and that the State is violating its duties under the public trust doctrine. There is a controversy ripe for adjudication, and she has a real interest in the resolution of this claim. She has standing to bring this action under the UDJA.

Conclusion.

Jaime Lynn Butler respectfully requests that this Court reverse the judgment of the Superior Court, declare that the public trust in Arizona includes the atmosphere, remand this case to the Superior Court for further proceedings, and award her attorneys fees and costs pursuant to the private attorney general doctrine.

See Arnold v. Arizona Dept. of Health Services, 160 Ariz. 593, 608-09, 775 P.2d 521, 536-37 (1989).

Date: July 9, 2012. Respectfully submitted,

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Certificate of Compliance.

Pursuant to Arizona Rule of Appellate Procedure 14, I certify that the attached brief uses proportionately spaced type of 14 points, is double-spaced using a roman font, and contains 8,624 words.

Date: July 9, 2012. Respectfully submitted,

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